# TABLE OF CASES


Page

*Arkansas v. Tennessee*, 246 U. S. 158, 38 S. Ct. 301, 62 L. Ed. 638 ..... 2

*Brasko v. Prislovsky*, 183 S. W. 2d 925, 207 Ark. 1034 ..... 6

*East Bay Sporting Club v. Miller*, 161 N. E. 12; 118 Ohio St. 360 ..... 7

*Everett v. Davis*, 107 P. 2d 650, subsequent opinion 115 P. 2d 821, 18 Cal. 2d 389 ..... 6

*Harmon v. Gould*, 94 P. 2d 749, 1 Was. 2d 1 ..... 6

*Hebron Gravel Road Company v. Harvey*, 90 Ind. 192, 196, 46 Am. Rep. 199 ..... 5

*Keener v. Sharp*, 111 S. W. 2d 118, 341 Mo. 1192, transferred 95 S. W. 2d 648 ..... 6

*Palmer v. Massengill*, 58 So. 2d 918 ..... 6

*St. Paul Fire and Marine Insurance Company v. Carroll*, Tex. Civ. App. 106 S. W. 2d 757, 758 ..... 5

*Scott v. Watkins*, 122 P. 2d 220, 63 Idaho 506 ..... 6

*Southern Pacific Company v. Proebstel*, 150 P. 2d 81, 61 Ariz. 412 ..... 5

*State v. Hawk*, 208 P. 709, 714, 105 Ore. 319 ..... 5

*United States v. Appalachian Electric Power Co.*, 311 U.S. 377, 61 S. Ct. 291, 300, 85 L. Ed. 243 ..... 9

*Waters and Water Courses*, American Digest System, key 38 ..... 5

*Words and Phrases*, "stream" (continuous flow sub-head), "running stream" ..... 5

*Yaskill v. Thibault*, 173 N. E. 504, 273 Mass. 266 ..... 7

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

---

Number 11, Original

---

STATE OF MISSISSIPPI,

Plaintiff

*versus*

STATE OF LOUISIANA,

Defendant

---

## REPLY BRIEF OF THE STATE OF LOUISIANA

---

*To the Honorable Supreme Court*
*of the United States of America:*

This reply brief is applicable to:

## PART A

## DIAMOND ISLAND TOWHEAD AREA

of the original brief by Louisiana.

The first and most important issue, under the "Diamond Island Towhead Area" part of this case, is the location of the eastern terminus of the boundary in the part of the channel

that became the "old channel," sometime after the avulsion in the 1860's. The Court can refer to Plate I of Louisiana's original brief herein and thereby better understand the conflicting contentions of the two states:

(a) Mississippi contends, and the Special Master found, that the Point "S" on such Plate I was the eastern terminus of the boundary in the "old channel" around the island. The boundary as found by the Special Master then proceeded in a generally northwesterly direction, across land (Bedford Bar), which is opposite the easterly part of the island, to that part of the channel that is generally northerly of the island. This Point "S" was Mississippi's contention as to the take-off place for a division of the accretions that subsequently accrued in this area, the line of division being the state line.

(b) Louisiana contends that the eastern terminus of the boundary around the island is more than a mile downstream and generally northwest from said Point "S"; and that such point is in the "old channel" approximately just east of the head of the island shown on such Plate I. From such point, Louisiana contends that the boundary continues around the island in the "old channel" as shown on Plate I. This point (eastern terminus) in the "old channel," where the current ceased to flow is Louisiana's contention as to the take-off place for a division of the accretions that subsequently accrued in this area; the line of division being the state line.

The legal argument for Louisiana's position is the holding by this Court in *Arkansas v. Tennessee*, 246 U. S. 158, 38 S. Ct. 301, 62 L. Ed. 638, viz:

". . . where the course of the stream changes through the operation of the natural and gradual processes of ero-

sion and accretion, the boundary follows the stream; while if the stream leaves its former bed and establishes a new one as a result of an avulsion, the boundary remains in the middle of the former channel. An avulsion has this effect, whether it results in the drying up of the old channel or not. So long as that channel remains a running stream, the boundary marked by it is still subject to be changed by erosion and accretion; but when the water becomes stagnant, the effect of these processes is at an end: the boundary then becomes fixed in the middle of the channel as we have defined it, and the gradual filling up of the bed that ensues is not to be treated as an accretion to the shores but as an ultimate effect of the avulsion."

Thus, Louisiana contends, as demonstrated by said Plate I, that the boundary remained in the "old channel" after the avulsion,

> "So long as that channel remains(s) (ed) a running stream . . . .";

and that so long as such channel remained a **running stream** the boundary marked by it was,

> ". . . still subject to be changed by erosion and accretion;"

and that this "old channel" remained a **running stream** at least through the time depicted on said Plate I.

The legal contention of the State of Mississippi, and as found and stated by the Special Master, is

> "I believe that when the old channel has so far deteriorated and become so filled by deposition as that it can no

> **longer be used for navigation** except in times of flood, it no longer has a thalweg. When the filling has proceeded to the point that **no water can enter the channel at low stages of the river,** which are normal during certain periods of the year, **there is then no current in the old channel** and the water has become stagnant." (Master's Report, page 10) (Emphasis supplied.)

Thus, Mississippi and the Special Master say that this "old channel" ceased to be a running stream when there was no water in such channel **at some periods during the year at a low water stage of the river.** (The contention about navigability being answered later on in this brief.)

We submit, then, that the real dispute between the states is boiled down to opposing contentions of the legal meaning of the words "running stream" as used by this Court in *Arkansas v. Tennessee*, supra. Mississippi contends (as was held by the Special Master) that this "old channel" of the Mississippi River was no longer a **running stream** when

> "... **no water can (could) enter the channel at low stages of the river**, which are (were) normal at certain periods of the year, there is (was) no current in the old channel and the water has (had) become stagnant."

Louisiana, to the contrary, contends that the fact that there was no low water flow for certain periods of the year in this "old channel" of the Mississippi River, is not the test as to when it ceased to be a running stream. Louisiana, in such contention, is supported by numerous holdings of appellate courts of many states, without any contrary view insofar as our research reveals. For a gathering of these decisions here relied on by Louisiana, we refer the Court to the *Ameri-*

*can Digest System* "Waters and Water Courses," key 38 "What constitutes a water course." See also, *Words and Phrases*, "stream" (continuous flow sub-head) and "running stream." We refer to a few of such cases, viz:

> " 'Running Stream' consists of a well defined channel with sides or banks, in which water habitually flows, **although it need not flow continuously.**" (*State v. Hawk*, 208 P. 709, 714, 105 Ore. 319.)

> "To constitute a running stream or water course, for the obstruction of which an action will lie, there must be a stream usually flowing in a particular direction, though it need not flow continually. **It may sometimes be dry.** It must flow in a definite channel, having a bed, sides, or banks, and must usually discharge itself into some other stream or body of water." (*Hebron Gravel Road Company v. Harvey*, 90 Ind. 192, 196, 46 Am. Rep. 199.)

> "A 'stream' consists of a bed, banks, and watercourse, and is a course of running water contemplating a body of water having a continuous flow in one direction, but, although it must have substantial existence, **it is not required that it flow continuously throughout the year** or throughout its course." (*St. Paul Fire and Marine Insurance Company v. Carroll*, Tex. Civ. App. 106 S. W. 2d 757, 758.)

> "A **continuous flow is not necessary** to coristitute a stream in its waters 'stream waters.'" (*Southern Pacific Company v. Proebstel*, 150 P. 2d 81, 61 Ariz. 412.)

> "A 'water course' is a running stream of water; a natural stream including rivers, creeks, runs and rivulets; **the stream need not flow continuously**, though there must be a definite channel having a bed and banks and something more than mere surface drainage over a tract of land

occasioned by unusual freshets or extraordinary causes." (*Brasko v. Prislovsky*, 183 S. W. 2d 925, 207 Ark. 1034).

"A stream is a water course having a source and terminus, banks and channels through which **waters flow at least periodically** and it usually empties into other streams, lakes or the ocean, but it does not lose its character as a water course even though it may break up and disappear." (*Everett v. Davis*, 107 P. 2d 650, subsequent opinion 115 P. 2d 821, 18 Cal. 2d 389.)

"A water course is a stream of water flowing in a definite channel, having a bed and sides or banks, and discharging itself into some other stream or body of water; **and the flow of water need not be constant,** but must be more than mere surface drainage occasioned by extraordinary floods, and there must be substantial indications of the existence of a stream, which is ordinarily a moving body of water." (*Scott v. Watkins*, 122 P. 2d 220, 63 Idaho 560.)

"A winding bayou, ten to twelve feet in depth, connecting lake with river and having well defined banks and channel, **and containing running water most of the year,** the volume depending upon the rainfall and stage of the river was a natural water course and water while confined in channel was not surface water." (*Keener v. Sharp*, 111 S. W. 2d 118, 341 Mo. 1192, transferred 95 S. W. 2d 648.)

**"That flow of water along a regular water course is intermittent does not affect its character as a water course."** (*Harmon v. Gould*, 94 P. 2d 749, 1 Was. 2d 1.)

"A natural water course is a water course which has a well defined bed and banks of varying width and depth, through which water is conveyed and discharged into some substantial reservoir or body of water, **but it is not necessary that there be a continual flow."** (*Palmer v. Massengill*, 58 So. 2d 918.)

**"Stream did not lose character as natural stream because in periods of small rainfall no water flowed in it."** (*Yaskill v. Thibault*, 173 N. E. 504, 273 Mass. 266.)

"Water course, is stream in definite channel discharging into another body of water **though not flowing continuously,** but resuming flow and definite course between recognized banks." (*East Bay Sporting Club v. Miller*, 161 N. E. 12, 118 Ohio St. 360.)

We contend then that Mississippi and the Special Master are in error when they say that this "old channel" ceased to be a running stream when,

"no water can (could) enter the channel at low stages of the river. . . .'

Mississippi erroneously also attempts to tie onto the words "running stream," as used by this Court in *Arkansas v. Tennessee*, supra, some connection with navigation, and speaks of this old channel not having a thalweg at some low water stages of the river. She then reasons that if a channel can no longer be navigated at some low water stages it has no thalweg, and, of necessity is then not a "running stream." The Special Master adopts Mississippi's argument and holds (Report, pp. 10, 11 & 12) that the "old channel" around the island in 1874, could

". . . no longer be used for navigation except in times of **flood**. . . ." (Report, p. 10) (Emphasis supplied.)

The Master's opinion was premised on Major Suter's map (see Plate II of La.'s original brief) and Major Suter's report

(R. 662) which accompanied the Chart (said Plate II) wherein Suter's report said,

> ". . . the bend of Diamond Island sixteen miles below Vicksburg, filled up, and the channel established itself permanently in the chute." (Report, 40)

The Special Master's holding that this "old channel" was only navigable at "flood" waters flies in the face of the survey made by the Mississippi River Commission in 1878-80, as set forth on Plate I of La.'s original brief (Exhibit La. Cross-exam. Fisk No. 4 (R. 328-9) ) and the Mississippi River Commission's notes on Exhibits 4-A and 4-B (R. 3289) which show a running stream in this "old channel" some five years after the time the Special Master said it was "filled up" at a low water stage of the Mississippi River, and no longer a navigable stream. See the Mississippi River Commission's notes on La. Cross-Exam. Fisk 4-B, wherein it is set forth that on this Plate I,

> "The adopted stage is about one-third of the extreme oscillation above low water."

Thus, this navigability contention is without substance: first, because this Court said in *Arkansas v. Tennessee*, supra, that

> "So long as that channel remains a running stream, the boundary marked by it is still subject to be changed by erosion and accretion; . . . .";

therefore, the test is whether the stream was a "running stream" and not whether it was a navigable one. Second, even if this navigability contention had actual backing, then it is clear that the "old channel" met the test of navigability as late as 1878-80, as depicted on Plate I, for the water in this "old channel" as so depicted on Plate I, was only "one-third of the extreme oscillation above low water" (notes on Exhibit La. Cross-Exam. Fisk 4-B). Thus, this "old channel" was navigable at least at all times during the other two-thirds of the stages above low water. This Court held in its opinion, *United States v. Appalachian Electric Power Co.*, 311 U. S. 377, 61 S. Ct. 291, 300, 85 L. Ed. 243, viz:

> "Nor is it necessary for navigability that the use should be continuous."

We fail to see the relevancy of the case of *Handley's Lessee v. Anthony, et al.*, 5 Wheaton 374, 5 L. Ed. 113, so heavily relied on by the State of Mississippi and quoted at length in the Special Master's Report (R. 10 and 11). In that case the only questions decided were: First, "Whenever a river is a boundary between states, it is the main, the permanent river, which constitutes that boundary." Certainly that legal proposition has no relevancy to the question here, that is, in the case of an avulsion, the boundary remains in the "old channel" which is subject to be changed by erosion and accretion so long as that "old channel" remains a running stream. Second, in that case the State of Virginia retained the river within its bounds, this Court said, because in its grant to Congress it only conveyed that territory "situate, lying, and being, to the north-west of the river Ohio." The point then decided was that the State of Indiana went to the low water mark of the river. There is

further no relevancy of such determination to the point at issue here, for here, the question is when does a stream cease to be a "running stream."

The correct legal conclusion, we submit, as to the location of the eastern terminus of the boundary in the part of the channel that became the "old channel," sometime after the avulsion in the 1860's is at the head of and in the "old channel," when it ceased to be a running stream; and it only ceased to be a running stream sometime after 1878-80, for it was obviously then shown (see said Plate I) as still a running stream. Clearly then, this "old channel" changed from its position in 1874 as found by the Special Master premised on when the water first ceased to flow **at low water** therein (claimed to be as depicted on Plate II of La.'s original brief), to at least the position of the "old channel" in 1878-80 as located by the Mississippi River Commission on its chart (see Plate I of La's original brief)—and this change of location of the "old channel" was by erosion and accretion brought about by the "old channel" remaining a **running stream** from 1874 through at least 1878-80. For the course of this stream could only have been changed through the operation of the natural and gradual processes of erosion and accretion, as there is no evidence whatsoever as to a second avulsion at such point. This last "old channel," though now long since abandoned by a current of a running stream, is yet visible on the ground today, and has been recently surveyed (La. Exhibit No. 36—R. 1325). The chief witness for the State of Mississippi (Fisk) also so located this last channel, see particularly his Plates 8 and 10 of Mississippi's Exhibit Fisk 4 (R. 46). Thus, the eastern terminus of the boundary in the "old channel," now long since

abandoned, is shown on said survey (La. Exhibit No. 36—R. 1325). Further, the "old channel" as so surveyed on the ground today, is approximately in the same position as it was in 1878-80 as shown on Exhibit La. Cross-Exam. Fisk No. 4—R. 328-9 (Plate I of La.'s original brief).

The foregoing legal propositions besides controlling the location of the "old channel" around Diamond Island equally control the location of the boundary in the old channel of the Mississippi River at Oak Bend, which is the southerly boundary of the Diamond Island Towhead Area, that is, inasmuch as such "old channel" at Oak Bend yet remains a running stream even to this day, the boundary marked by it is still subject to be changed by erosion and accretion, despite the fact that some low water ceased to flow therein in 1939.

The other remaining questions as to this Diamond Island Towhead Area have to do with the ownership of the accretions, and alternatively the division thereof between the states, all of which are covered in our original brief. Such remaining questions turn on the location of the eastern terminus of the boundary in the "old channel" around the island.

## CONCLUSION

We submit that Mississippi and the Special Master erred in contending and holding that this "old channel" ceased to be a running stream when,

> "No water can (could) enter the channel at low stages of the river. . . ."

We further submit that the boundary should be fixed in the "old channel" when it ceased to be a running stream.

Respectfully submitted,

FRED S. LEBLANC
Attorney General
State of Louisiana
2201 State Capitol
Baton Rouge, Louisiana

JOHN L. MADDEN
Assistant Attorney General
State of Louisiana
2201 State Capitol
Baton Rouge, Louisiana

ASHTON L. STEWART
Special Assistant Attorney General
State of Louisiana
312 La. National Bank Building
Baton Rouge, Louisiana

*Counsel for Louisiana.*

*Of Counsel:*

EDGAR H. LANCASTER, JR.
Special Assistant Attorney General
State of Louisiana
Tallulah, Louisiana

LANE FULLER
Special Assistant Attorney General
State of Louisiana
Ruston, Louisiana

## CERTIFICATE

This is to certify that copies of the foregoing brief have been served upon counsel of record of the State of Mississippi by mail, deposited in a United States mail box, with first class postage prepaid, addressed to counsel of record of the State of Mississippi at the post office address listed.

Baton Rouge, Louisiana, October ___, 1955.

ASHTON L. STEWART
Special Assistant Attorney General
State of Louisiana